STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 250150 Wayne Circuit Court
ERIC NORFLEET, Defendant-Appellant.	LC No. 03-000823-01

Before: Zahra, P.J., White and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two years' probation for the carrying a concealed weapon conviction, fifteen months' probation for the felon in possession of a firearm conviction, all to be served consecutive to two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to sustain his convictions. We disagree.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant specifically argues that insufficient evidence was presented to establish his possession of the weapon found in his vehicle. "[T]he term 'possession' includes both actual and constructive possession. . . . [A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *People v Burgenmeyer*, 461 Mich 431,438; 606 NW2d 645 (2000) (citation omitted). "Possession may be proven by circumstantial as well as direct evidence." *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). The question of possession is one of fact. *Id.* "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly

drawn from the evidence and to determine the weight to be accorded to those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Here, police officers pulled defendant over because his car was swerving out of its lane. When approaching defendant's car the officers smelled marijuana smoke, and ordered defendant out of the car. Officer Eaton conducted a pat down search and found a small bag of marijuana in defendant's pocket. Defendant was arrested, and Eaton returned to defendant's car and found a gun under the driver's seat. Defendant was the only occupant of the car, and Officer Eaton testified that defendant admitted to him that he did not have a permit for the gun and that he carried it for protection.

Defendant, on the other hand, argues that he had just received his car back after having loaned it to a friend for three days. Defendant denies making any statement to Officer Eaton regarding the gun and further denies having any knowledge of the gun's presence in his car. However, the prosecution is not required to negate every theory consistent with defendant's innocence to sustain its burden; rather, it must prove the elements of the crime beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational jury could have found beyond a reasonable doubt that defendant possessed the firearm.

Next, defendant argues that he was denied the effective assistance of counsel because his attorney failed to examine audio and video recordings of defendant's interaction with Officer Eaton in the squad car on the way to the police station. We disagree.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

With regard to defense counsel's decision not to seek to introduce the police recordings as evidence, the United States Supreme Court has made clear that:

> "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." [*People v Wiggins*, 539 US 510; 123 S Ct 2527, 2535; 156 L Ed 2d 471 (2003), quoting *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Id.*

Here, defendant never made a motion for a new trial or an evidentiary hearing. Consequently, there is no record showing that defendant's trial counsel failed to investigate the content of the police recordings. Further, defendant has not made an offer of proof regarding what the police recordings would show.

Even if defense counsel did not review the content of the recordings, legitimate arguments can be made that defense counsel strategically avoided the police recordings. First, defense counsel used the prosecution's failure to present the police recordings during closing argument to impeach the credibility of Officer Eaton. Second, if defense counsel had viewed the police recordings and they supported Officer Eaton's testimony, counsel would have been ethically comprised in pursuing the defense that defendant was unaware of the gun's presence in his vehicle. Affording deference to defense counsel's judgment, we conclude that defendant has failed to establish that decision counsel's decision not to present the police recordings at trial appears was not objectively reasonable under the circumstances.

Defendant further argues that defense counsel's performance was so deficient as to warrant a presumption of prejudice. This argument, however, also fails. The United States Supreme Court has recognized that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The circumstance that defendant argues applies in the present case is where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id*. at 659. Examination of the record, however, shows that defense counsel did subject the prosecution's case to thorough cross-examination with regard to the failure to present the police recordings, the lack of fingerprints on the gun, and the failure to run a registration check on the gun. Therefore, defendant is not entitled to a presumption of prejudice.

Defendant has not shown that his trial counsel's performance was deficient or that he was prejudiced at trial in any way. Defendant cannot meet his burden of showing that he did not receive effective assistance of counsel at trial. *Rogers*, *supra* at 714.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot